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No. 74

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Regretfully we conclude that it is necessary for us to reply to some matters contained in Respondents' briefs. Petitioner's reply brief in No. 73 has been served on us and we shall strive to avoid repetition.

Respondents' Statements of the Case

In their statements of the case, the United States and the Secretary of Agriculture (hereinafter re-

ferred to as the "Departments"), have adhered closely to the findings of the Board.[1]

On the other hand, Isbrandtsen Company, Inc. (hereinafter referred to as "Isbrandtsen"), although recognizing its stipulated obligation to be bound by the findings of the Board, has interlarded its statement with asserted facts which either were not found by the Board or are utterly inconsistent with the Board's findings. We could not, within proper limits, here call attention to each of these deviations from the Record. We think it sufficient to point to a few illustrations.

Isbrandtsen (Br. p. 23) cites page 20 of the Record for the statement that non-contract rates were *arbitrarily* fixed at a level 9½% higher than the contract rates. Neither page 20 nor any other page of the Record justifies this assertion. On the contrary, the Board (R. 32 to 34) found ample reasons why the spread is a reasonable one.

Isbrandtsen (Br. p. 25) asserts that the shipper's right to terminate his contract on three months' notice is of no value to him, as continuance under the contract for that period could possibly put him out of

[1] The lone exception is that the Departments (Br. p. 8) state that the Conference did not agree to respond in damages in the event of any inadequacy of service, citing R. 36. They apparently overlooked the following finding of the Board (R. 67):

> "* * * While there is no corresponding provision for liquidated damages to be paid in the event of carrier failure to provide adequate service, in our opinion, no such provision is necessary. The failure to specify the amount of damages in such circumstances is, in our view, nothing more than a recognition by the parties that damages may be readily ascertained, in the event of conference breach, on submission of the matter to arbitration, in accordance with article 10."

business. Isbrandtsen cites the Record, page 35, for this extraordinary statement. Neither that page nor any other page of the Record furnishes any support for the assertion.

Isbrandtsen (Br. p. 25, n. 14) states that under the shipper's contract as approved by the Board, the shipper would be precluded from using non-conference tonnage for the carriage of refrigerated cargo, even though refrigerated cargo had been excluded by the Board from the dual-rate system. The Board's order specifically excepted refrigerated cargo from the cargoes which the contract shipper is required to ship exclusively by Conference tonnage (R. 76).

Isbrandtsen (Br. pp. 29-32) asserts that it was excluded from the trade between the Philippines and the United States by virtue of the dual-rate system prevailing in that trade, or, at least, its cargoes transported in that trade were diminished by reason of that dual-rate system.[2] There is not a word in the Record which would indicate that Isbrandtsen's carryings from the Philippines were diminished by a dual-rate system or any cause other than Isbrandtsen's preference for the better-paying Japanese cargoes. The only finding on this subject is (R. 26):

> "* * * In allocating space as between Japanese and Philippine cargo, the higher rated Japanese cargo is given priority."

We believe that the foregoing illustrations amply demonstrate the unreliability of the factual assertions in Isbrandtsen's brief.

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[2] Founded upon this baseless assertion, Isbrandtsen states (Br. pp. 29-30, 76) that its experience in the Philippines proves that dual-rate systems lead to monopoly.

Respondents' Arguments

1. Relative to the Prime Purpose of the Shipping Act.

The Departments (Br. pp. 15-16, 18, 22, 24, 31, 45) predicate their argument upon the proposition that the chief purpose of the Shipping Act is to protect the non-conference carrier no matter how disruptive of the commerce of the United States its practices and activities may be. We believe that in our principal brief (pp. 28, 86-88) we have demonstrated that the prime purpose of the regulatory sections of the Act is to protect the commercial interests of our country against the disruptions of rate structures and service attendant upon rate competition in ocean transportation. Such disruption was regarded by the legislators as imposing a handicap upon our shipping interests and our merchants in their competition with their foreign counterparts. To avoid the disruptive effect of such competition, the Act envisaged a program of uniform and stable rate structures fixed by agreement among the carriers engaged in a particular trade under the scrutiny of a regulatory agency. It was recognized that such agreements might collide with the prohibitions of the antitrust laws. Accordingly, the statute (§15) contains a specific exemption of agreements approved by the Board from the provisions of the antitrust laws.

It is true that the Act shows the purpose of preventing certain practices, clearly and unmistakably described, which were found to permit a strong carrier or a group of carriers to throttle competition.

But it would pervert the purpose of the Act to suggest, as the Departments apparently do, that peripheral solicitude for non-conference competition outweighs the central objective of the Act—to realize for United States commerce the benefits of cooperative carrier rate-making in conference. To suggest that conferences have under the Act no lawful defense against rate competition which destroys this objective is to accuse Congress of nullifying its own purpose; for the consequence of the suggested reading of the statute would be to shield the non-conference competitor in practices that make impossible the maintenance of stable rates.

The argument of the Departments proceeds upon the assumption that the language of the Shipping Act must be read, wherever possible, in a way that will effectuate the policy embodied in *the antitrust laws*. We maintain that the language of the Shipping Act must be read in a way that will carry out the policies and objectives of *the Shipping Act*. This, we take it, is precisely what this Court held when it was confronted with an analogous problem in *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86 (1953).

This Court "has not held that competition is an absolute", nor that "competition is of itself a national policy" in those areas of economic activity, such as transportation, "where policy has shifted from one of prohibiting restraints on competition to one of providing relief from the rigors of competition, . . ." (*Ibid.* at 92). To provide relief from the rigors of competition in ocean shipping, the Shipping Act exempts from the antitrust laws all agreements which

are approved by the regulatory agency in accordance with the provisions of §15. While the policy in favor of competition was given weight by Congress when it prohibited the Board from approving certain conference practices, it is our contention that, if the objectives of the Act are considered, it can reasonably be concluded only that Congress could not have intended, by the language upon which respondents rest their case, to deprive the Board of discretion to approve a dual-rate system which it found was essential to the survival of the conference itself and which it found would leave the non-conference competitor with an equitable share of the total cargo.

Notwithstanding their devotion to the ideal of untrammeled competition, the Departments, like Isbrandtsen, charge the Conference with initiating a rate war (Depts. Br. pp. 29, n. 13, 50; Isbrandtsen Br. pp. 36, 154, n. 59). Ignoring the steady losses which Isbrandtsen's cut-rate competition had inflicted upon the Conference lines in the preceding years, while the Conference was maintaining stable rates, the Departments charge the Conference lines, as it were, with an act of aggression when they released the most important commodities from all restrictions upon freedom of competition. In view of the large increase of its service which Isbrandtsen was planning at the time, many of the Conference lines may well have disappeared from the trade, but for the opening of rates, before the Conference could complete the administrative and judicial procedures which it hoped would enable it to adopt the dual-rate system. In a realistic sense it was Isbrandtsen's rate cutting which

made open rate competition, and the consequent rate war, inevitable pending the institution of a dual-rate system.[3]

2. Respondents' Arguments Based Upon the Theory That the Dual-Rate System Necessarily Eliminates Non-Conference Competition Are Unfounded.

Although in their Statement of the Case the Departments adhere closely to the Record, once they plunge into their argument, the zeal of advocacy apparently erases recollection of the Board's findings in this case. Throughout the brief, arguments are predicated upon the assertion that "* * * the admitted purpose of the system is to force shippers into giving all of their business to the conference, thereby aiding the conference in obtaining a monopoly of the trade" (*e. g.*, Br. pp. 24, n. 10, 46-48).

[3] Isbrandtsen (Br. pp. 36-38) attacks the Board for failure to end the rate war. It states that the Board has repeatedly asserted a power to control rate action of conferences which it does not have with respect to the rate action of individual lines. Isbrandtsen chooses to disregard the nature of the problem with which the rate war confronted the Board. The Board's power over conference rate action arises from its power, under §15 of the Act, to cancel a conference agreement if action thereunder should "operate to the detriment of the commerce of the United States". Thus, if a conference fixes rates which are drastically high or drastically low, the Board may warn the conference that, in the absence of the proper rate adjustment, the conference agreement will be cancelled. The Board action in such case will be effective only if a conference fears cancellation of its agreement and the consequent rate competition among its members. But when a conference is compelled by the rate cutting practices of non-conference carriers to open rates on most commodities, the conference lines are already in competition among themselves to such an extent that the threat of dissolution of the conference will neither solve the problem which caused the conference to act as it did, nor will it be effective to influence conference action. It is significant that all the cases cited by Isbrandtsen (Br. p. 38) involve unduly high conference rates, except *Cargo to Adriatic*, which involved an unduly low conference rate on a single commodity. In any such case the threat of cancellation of the conference agreement would obviously confront the member lines with serious consequences.

Upon the assumption that the dual-rate system is coercive in effect and will produce a monopoly, the Departments erect substantially their entire argument for an interpretation of §14, Third, of the Shipping Act, outlawing the dual-rate system. Thus the Departments ignore the finding of the Board that the dual-rate system in the instant case will leave Isbrandtsen 10% or more of all the cargoes in the trade, which, the Board finds, is in excess of the percentage which the Conference lines will average and which constitutes an equitable share of the traffic (R. 62).

The Departments (Br. p. 46) and Isbrandtsen (Br. p. 78) would justify this disregard of the Board's findings on the basis of an incomplete quotation from the brief filed by the Board's counsel in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), affd. by an equally divided court *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952).

They do not set forth a complete quotation of the relevant portion of the Board's brief in question. By asterisks they indicate the omission of the following sentence:

> "* * * The real question, as we see it, is whether the tendency toward monopoly which the system promotes (in a degree which varies from trade to trade) is legitimate. * * *" (Board's brief in 96 F. Supp. 883, pp. 3-4).

We submit that this is far from a concession that dual-rate systems inevitably produce monopoly. Rather, it leaves open for Board determination in each case (as was done in this case), in accordance

with *Swayne & Hoyt, Ltd.*, 300 U. S. at 304, (a) the degree of restriction imposed on non-conference competition, and (b) the value of the system in achieving and maintaining stability of rates and services, and (c) the weighing of these factors in the public interest.[4]

3. The Departments' Struggle With §14, Third.

a) Agreements Which May Be Approved Under §15.

The Departments (Br. pp. 45-46) base a considerable part of their reasoning upon the proposition that §15 of the Act does not contemplate the filing, and under certain conditions, the approval of agreements among carriers "controlling, regulating, preventing, or destroying competition" with other carriers who are not parties to the agreement. They assert that it is the statutory purpose to refer only to agreements having the above-quoted effects on competition *among the parties to the agreement.*

This position is demonstrably unsound. The section does not contain, either expressly or by implication, any such limitation. But there is much more to be said against any such restrictive construction.

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[4] Isbrandtsen (Br. pp. 49, 122) and the Departments (Br. p. 50) point to the number of conferences which do not maintain dual-rate systems as proof that all conferences can exist without such a system. The argument misses the mark. Our entire contention is that in some trades, dual-rate systems are necessary and in other trades they are not necessary, dependent upon competitive conditions and susceptibility of the trade to disruption by cutthroat competition. Our entire thesis is that it is for the Board to decide from case to case whether or not the conditions are such that a dual-rate system is indispensable.

The first paragraph of §15 is the publicity paragraph. The legislative history amply demonstrates that a major evil of pre-1916 agreements among carriers was that they were maintained in secrecy.[5] No one would assert, we are sure, that carriers might enter into agreements for the maintenance of a deferred rebate system and might legally conceal the existence of such agreements from the Board. Deferred rebate agreements must be filed, but they cannot be approved because they violate the Act (§14, First). The failure to require such filing would deprive the Board of the prime source of information on the basis of which to exercise its power, to which we shall now refer, to stop the performance of such illegal agreements. Yet there is no sort of agreement which would more completely destroy competition with an outside line.

The second paragraph of §15 gives the Board this power to disapprove and cancel agreements which it finds "to be in violation of this act." The section, therefore, clearly requires that agreements which violate the Act must be filed, if only to be stricken down and penalized in accordance with the final paragraph of §15. But the second paragraph also commands the Board to approve those agreements which are not violative of the Act, and which do not offend against the other criteria, *i. e.*, are not unduly or unreasonably discriminatory or detrimental to the commerce of the United States. There is no command to disapprove agreements restricting or de-

[5] We understand that an Appendix incorporating much of the Report of the Alexander Committee is being prepared by the Departments and the Board.

The Board has dealt with the legislative history in its Reply Brief in a manner which we thoroughly endorse. We, accordingly, do not deal specifically with legislative history in our Reply.

stroying competition between parties thereto and other carriers.

It will not do, therefore, to approach §14, Third, with a preconception that all agreements affecting competition with non-conference lines are beyond the pale of §15 even when such an agreement is specifically found by the Board to be in the interests of the commerce of the United States.

b) "Retaliation" as Dealt With in the Departments' Brief.

The Respondents have not dealt with or answered the argument in our principal brief (pp. 40-46), that prerequisite to a *per se* violation of §14, Third, there must be an administrative finding that the conduct under attack constitutes "retaliation." We pointed out that to the contrary, the Board had found that the dual-rate system had been adopted to enable the Conference lines to obtain needed cargo.[6]

In lieu of meeting this argument the Departments have taken a shifting position which discloses its untenability.

The Departments argue (Br. pp. 22-29) for a "realistic" interpretation of §14, Third. The Departments have not suggested any meaningful reading of the word "retaliate" in that section. To support their contentions they read the statute as if the word "retaliate" were not there at all and as if this subdivision prohibited carriers to:

"Third. Refuse, or threaten to refuse, space

[6] Strangely, the Departments state (Br. p. 40) that the distinction between the shippers' contracts before the Alexander Committee and the shippers' contracts in the instant case is that, in the former, the purpose of the conference was to acquire desirable business.

> accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

In this way, the Departments confirm what they set out to refute—that their reading of §14, Third, renders surplusage not only the word "retaliate" in §14, Third, itself, but also §14, First, §14, Fourth, §16, First, §16, Second and §17. The Departments make it clear that they regard any price differential as both discriminatory and retaliatory whenever it is made because the shipper has patronized any other carrier or has filed a complaint charging unfair treatment, *or for any other reason.* Sections 15, 16, First, and 17 prohibit "unjustly" discriminatory or unfair agreements and "undue or unreasonable" preference, advantage, prejudice or disadvantage and "unjustly" discriminatory or prejudicial rates, fares or charges. Each of these provisions patently contemplates that there may be lawful prejudices, disadvantages and discriminations where the discriminatory treatment is reasonable, just or due, *i. e., supported by reason.* To read §14, Third, as prohibiting discrimination "for any other *reason*" is to emasculate three sections of the statute. It is only by giving full effect to the word "retaliate" that substantial portions of the Act may be saved. The tortuous explanation attempted by the Departments (Br. p. 27) does not obviate the point which we have just made.

The Departments' argument has plausibility only if it is assumed that the basic issue in this case has already been decided in their favor, namely, whether the only kind of price differential which is neither

illegally *discriminatory nor retaliatory* is one based on differences in cost or value of service rendered to shippers. As we shall show below, "settled principles of transportation law" (Dept. Br. p. 28) do not answer this question in the way the Departments suppose.

The issue in this case is not disposed of by ignoring the Board's findings and substituting therefor words of evil connotation, *e. g.*, to describe the alleged effects of the dual-rate system as a "boycott" (Isb. Br. pp. 22, 65, 73, 150; Dept. Br. pp. 18, 21, 22, 28, 32-33, 39, 40) or a "monopoly of the trade" (Isb. Br. pp. 34, 62-63, 75-87, 158; Dept. Br. pp. 24, n. 10, 46-47); or to refer to the non-contract rates as "penal" and "penalty" rates (Isb. Br. pp. 65, 75, 150; Dept. Br. pp. 16, 18, 23, 24, 43, 45); or to refer to the liquidated damage provision of the shipper's contract as a "penalty" clause (Isb. Br. pp. 23, 65, 74, 103-4; Dept. Br. pp. 18, 44).

The Departments, to be sure, concede that "discrimination", when used without qualifying adjectives such as "unreasonable" or "unjust", is condemned by the statute only when the discrimination is used as a method of retaliation. They say (Br. p. 27): "Even a little retaliation, achieved by a discriminating or unfair method, is a dangerous and undesirable practice." But they do not suggest under what circumstances a discriminatory or unfair method can be said to achieve a "little retaliation". Again we must conclude that their answer would be, that there is retaliation whenever there is a discrimination "because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason." So, despite the concession that at

least a "little retaliation" is prerequisite to violation, the substance of the Departments' argument would deprive the word "retaliate" of any independent significance.

It cannot be over-emphasized that the word "retaliate" was the keystone of the majority opinion below.[7]

c) The Departments Have Not Overcome the Charge That Their Argument Renders §14, First, Surplusage.

The Departments (Br. p. 32) attempt to refute our contention that their interpretation of §14, Third, renders surplusage §14, First (the condemnation of deferred rebates), and §14, Second (the condemnation of fighting ships), by arguing that the word "other" in §14, Third, should be read as "other than deferred rebates and fighting ships as well as other than refusing or threatening to refuse space accommodations". But this reading would be plausible only if major surgery is used to rewrite §14 so that it consists of five sub-divisions instead of four, with the clause "resort to other discriminating or unfair methods, because etc." taken out of sub-division Third and made an independent sub-division. Since, however,

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[7] Isbrandtsen likewise vacillates between the idea that in order to found a charge of violating §14, Third, there must be retaliation as well as discrimination, and the idea that discrimination alone will do (Br. pp. 95, 98). At p. 95 Isbrandtsen speaks of congressional restraint "upon the common carrier from using retaliatory or discriminatory methods against a shipper 'for any other reason' * * *." Here Isbrandtsen takes the position that discriminatory action is illegal even if not retaliatory. But on the same page, and again on p. 98, Isbrandtsen says that discriminatory action is illegal only if it amounts to "retaliatory action or reprisals against a shipper because he had done something which he had a perfect right to do". In no place, however, does Isbrandtsen explain what, apart from the discrimination itself, makes the discriminatory action taken because the shipper "had done something which he had a perfect right to do", retaliatory.

the "resort" clause is part of sub-division Third and the specification of space accommodations does not exhaust the list of services with respect to which there can be retaliation, the clause, as a matter of language, can reasonably be read only as referring to methods similar to the refusal of space accommodations.[8]

We submit that the need for such major surgery demonstrates the forced nature of the Departments' construction and cannot, in any event, be performed in dealing with a penal statute.

d) The Deferred Rebate and the Dual-Rate System Are Significantly Different.

The illustration given by the Departments (Br. p. 44) omits the chief distinguishing characteristic of the deferred rebate.

A proper illustration would be as follows:

On, say, December 31, 1955, the conference circularizes shippers to the effect that if they will confine their shipments to conference vessels during 1956, the carriers will, on June 30, 1957, rebate 10% of freight paid during 1956, provided, also, the shipper has patronized conference vessels exclusively from January 1, 1957, to June 30, 1957. Again, say, on December 31, 1956, the conference circularizes shippers similarly

[8] We stated in our principal brief (pp. 37-38) that the Court could find illustrations of refusals of common carrier facilities by reference to the types enumerated in §14, Fourth. The Departments erroneously assumed that the types which we referred to in our brief as merely illustrative, were exclusive (Dept. Br. p. 30). The Court will find in *United States* v. *Alaska S. S. Co.*, 110 F. Supp. 104 (W. D. Wash. 1952), a handsome catalogue of types of physical facilities, denial of which comes within our concept of the true definition of "other discriminating or unfair methods" as used in §14, Third.

with respect to the year 1957 and the first six months of 1958, and so on year by year. Let us examine the effect of this arrangement on shippers.

Shipper "A" does not patronize any carrier other than conference lines, and on June 30, 1957, and on June 30, 1958, receives rebates of 10% of freight paid during 1956 and 1957 respectively. Shipper "B" patronizes the conference lines exclusively during 1956, and during the first four months of 1957. During 1956, he pays conference lines freight aggregating $50,000. During the first four months of 1957, he pays conference lines freight totalling $15,000. At the end of the fourth month of 1957, he desires to avail himself of a non-conference shipping opportunity. What sacrifice must he make in order to avail himself of this opportunity?

If "B" ships by the non-conference lines before June 30, 1957, he will lose the $5,000 rebate earned on shipments made during 1956, plus the $1,500 rebate earned on shipments made during 1957, as well as 10% of any additional freight which he may pay to conference carriers before December 31, 1957. If he decides to patronize conference lines exclusively up to June 30, 1957, in order to save the $5,000 rebate earned on his 1956 shipments, the conference lines will be accumulating in their pockets 10% rebate on each additional shipment made during 1957, which, however, he will sacrifice if, after June 30, 1957, and at any time before July 1, 1958, he decides to patronize the non-conference lines. Thus, he is compelled from year to year to continue under the deferred rebate system, on pain of losing 10% of all freight which he may have paid during a period of up to eighteen months.

This result is to be contrasted with the position of a contract shipper under the dual-rate system. At no time do the conference lines accumulate in their pockets any of his funds; and he can, at any time, without loss of a penny to himself, terminate his arrangement on three months' notice. Of course, he will be entitled to the contract rates during the notice period.

e) The Construction for Which We Contend Leaves No Room for Evasion.

Departments argue (Br. pp. 23-24) that the Board's construction would enable a carrier to evade the purposes of the Act. They argue that consistently with that interpretation a carrier could retaliate against a shipper by refusing him space accommodations because he had refused to contract to ship exclusively by conference vessels.

First, we consider our prime contention that the words "other discriminating or unfair methods" in §14, Third, do not apply to contracts and rates. There is no inconsistency between this position and a concession that the section condemns retaliation by refusal of shipping space because the shipper will not become a contract shipper.

Secondly, we consider our position that even if the words "resort to other discriminating or unfair methods" should be read to apply to contracts and rates, the dual-rate system still would not constitute a violation *per se* of §14, Third. Under this interpretation again the supposed evasion would not be possible. Although a denial of space *when in retaliation* for

refusal to become a contract shipper would violate §14, Third, still the charge of a lower rate to the contract shipper than to a non-contract shipper would not *per se* constitute a violation; it would merely be the granting of a consideration for which the shipper bargained. It could become a violation only if the Board should find as a fact that the higher rate charged to the non-contract shipper was actually retaliatory in purpose rather than a rate reasonably arrived at for the legitimate purpose of obtaining cargoes.

4. The Authority of *U. S. Navigation Co.* and *Far East Conference* on the Question of Illegality *Per Se* Has Not Been Impeached.

Respondents have sought to dismiss *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), and *Far East Conference* v. *United States*, 342 U.S. 570 (1952), as mere primary jurisdiction cases which did not determine the question of illegality *per se* of the dual-rate systems there under attack.

Respondent's argument in this regard ignores the nature of the contentions pressed upon the Court in those cases and the significance of the primary jurisdiction rule. In both cases the complainants contended that the Board could not approve the respondents' practices because the dual-rate system is illegal *per se* under the Shipping Act. Therefore, they argued, there would be no point in ceding primary jurisdiction to the Board since, the dual-rate system being illegal *per se*, no facts or attending circumstances found by the Board could render it legal.[9]

[9] This argument was adopted in the dissenting opinion in *Far East Conference*, 342 U.S. 570, 578-579.

The touchstone to the correct interpretation of *U. S. Navigation Co., Far East Conference*, and the lower court decisions applying those cases is *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922). The rule there laid down was that where only a pure question of law is involved, the reference of the case to an administrative agency is not required; but that in all cases where an expert analysis of technical facts and of attending historical, competitive, and other business circumstances is required for the resolution of the legal issues, there must be a reference to the body specifically created to perform that function. This principle was at the foundation of the decision in *U. S. Navigation Co.* (284 U. S. at 481-482). Accordingly, the disposition of that case by dismissal of the judicial proceedings in deference to primary administrative jurisdiction, can only signify that there was not a pure question of law—*i. e.*, the dual-rate system was not illegal *per se*—and the issues required resolution on an expert evaluation of technical information. This doctrine directly applied to the Shipping Act was followed without qualification in *Far East Conference*. The lower court cases, *Wisconsin & Michigan Transportation Co.* v. *Pere Marquette Line Steamers*, 67 F. 2d 937 (C. C. A. 7th 1933), and *United States* v. *Alaska S.S. Co.*, 110 F. Supp. 104 (W. D. Wash. 1952) (cited Isbr. Br. pp. 137-138), which applied the rulings of this Court with respect to primary jurisdiction under the Shipping Act, must also be explained on the ground that in those cases the courts were of opinion that the facts alleged in the respective complaints and indictments did not as a matter of law constitute violations of the Shipping Act, but required an examination by the Board of the surrounding facts and circumstances and an applica-

tion to those facts and circumstances of its expert judgment.

Wisconsin & Michigan Transportation appears to have been decided on the ground that the charge that defendant was using a "fighting ship" was a mere allegation of a legal conclusion; and that the allegations that the defendant was charging unreasonably low rates and that it was doing so for the purpose of ruining the plaintiff's business and that these facts made out a case of "fighting ship" involved determinations clearly beyond the court's functions. The issues thus presented could not be resolved without an examination of all facts and circumstances. A mere inspection of §14, Second, indicates that expertise is required in determining whether a "vessel [is being] used in a particular trade * * * for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade." Similarly, when a violation of §14, Third, is charged, it is for the Board to determine whether or not there has been retaliation and whether or not there has been "resort to other discriminating or unfair methods."

In *Alaska S.S. Co.* the complaint and indictment were drawn under the Sherman Act and contained no words of art under the Shipping Act. Some of the acts alleged might have been held by the Board to constitute violations of the Shipping Act and others might have been so interrelated with such acts as to require administrative adjudication. *Alaska S.S. Co.* appears to be entirely consistent with *Great Northern Ry. Co.* and with the interpretation of *U. S. Navigation Co.* set forth in our principal brief.

That this Court in *U.S. Navigation Co.* did reject the doctrine of illegality *per se* is further emphasized by the following consideration. There the plaintiff argued that the Board in *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), had already ruled that a dual-rate system was illegal and therefore the Court should not insist on a further consideration by the Board of that question. This Court rejected the argument and in this particular stated (284 U.S. at 488):

> "* * * To hold otherwise would be to create the doubtful, and perhaps dangerous, precedent that a decision of the Board in respect of one agreement definitely establishes that the rule of that decision must, without more, be applied to all other agreements alleged to be of a similar character, although it may turn out, upon investigation, that the allegations are not warranted, *or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result.*" (Italics supplied.)

This language would appear to dispose of Respondents' contention that this Court did not consider the legality of dual-rate systems to depend upon the facts and attending circumstances.

The Departments (Br. p. 59) cite *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752 (1947). There the plaintiff had not completed the procedure specified by the statute for renegotiation of contracts, but attempted to obtain an injunction against further administrative proceedings on the ground that the statute was unconstitutional. The case was therefore clearly one which involved the principle of the exhaustion of administrative remedies and not one involving the principle of primary jurisdiction. The distinction has

recently been sharpened by this Court in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63-64 (1956).

5. The Proposed Dual-Rate System Is Not Unlawful Under §§15, 16 and 17 of the Shipping Act.

Isbrandtsen contends (Br. pp. 147-155) that the judgment below could be supported on the theory that the proposed dual-rate system is unduly prejudicial and unjustly discriminatory in violation of §§15, 16 and 17 of the Shipping Act. The argument seems to be that, on principles conjured out of cases decided under the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. §1, *et seq.*, the dual-rate system is *per se* illegal under the enumerated sections of the Shipping Act. We would have thought that if anything had been made clear by *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303-304 (1937), it was that a dual-rate system is only *prima facie* discriminatory and that its lawfulness depends on the Board's finding whether the discrimination is undue or unreasonable. Isbrandtsen has cited *Wight* v. *United States*, 167 U. S. 512 (1897); *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467 (1911); *Chicago, Ind. and L. Ry. Co.* v. *United States*, 219 U. S. 486 (1911); *I. C. C.* v. *Delaware, L. & W. Railroad*, 220 U. S. 235 (1911); *I. C. C.* v. *B. & O. Railroad*, 225 U. S. 326 (1912); *Fourche R. R. Co.* v. *Bryant Lumber Co.*, 230 U. S. 316 (1913); and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57 (1920), for the proposition that, as a matter of law, dual-rate systems are unlawful, since they involve the charging of different rates to different shippers for the same service, and that, therefore, there can be no justification of the discrimination. The Departments, in

support of their argument that there can be no justification of a discrimination under §14, Third, rely on the same proposition as embodying "settled principles of transportation law". These cases rest on §2 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. §2, a provision which has no counterpart in the Shipping Act, and, accordingly, such authorities are inapplicable. Section 2 of the Interstate Commerce Act contains an absolute prohibition of the charge of different rates to different shippers similarly situated, and constitutes any such charge *per se* unjust discrimination. The legislative history abundantly demonstrates that the framers of the Shipping Act consciously omitted any such provision as being inappropriate to ocean transportation. In §17 Congress prohibited unjust discrimination and unjust prejudice, but confided to the Board the determination in its sound discretion whether discriminations and prejudices are unjust, without placing upon the Board the statutory straight-jacket in which §2 of the Interstate Commerce Act encases the Interstate Commerce Commission.

Under the Interstate Commerce Act, however, it is not true that the Commission cannot validate differences in charges to different shippers of the same commodity between the same termini when competitive forces render a difference in rates justifiable.

In *Eastern-Central Association* v. *United States*, 321 U. S. 194 (1944), it appeared that a truckload consisted of 20,000 pounds. An economy was effected in carrying a truckload as against less than a truckload. On the other hand, a railroad carload consisted of 30,000 pounds or, in other words, a truckload plus

a half truckload. Motor carriers proposed three levels of rates—the highest for less than a truckload, the median for a truckload, and the lowest for 30,000 pounds, or a truckload plus a half truckload. This lowest rate was predicated exclusively on the competition between trucks and railroads. It could not be justified on the basis of a cost saving. The Interstate Commerce Commission, adhering to a previously announced policy that volume differentials would not be approved unless based on a cost saving, refused to consider rail competition as a justification for the 30,000 pound differential. In disapproving the Commission's refusal to consider carrier competition as a factor justifying a rate differential, this Court said (321 U. S. at 207-208):

> "* * * The junction of difference in available units, with rates geared to them, *and the fact of competition or competitive possibility produces or may produce consequences neither the character of the unit nor the fact of competition, nor both together, could create in either form of service taken alone.* In short, the very fact a rail carload is 30,000 pounds and a truckload 20,000, with rates respectively tied to these weights, may make a life-or-death difference in the competitive struggle, with consequences affecting not only the carriers but the public interest as well. And appellants' argument that a 30,000-pound minimum is *necessary to meet rail competition* is at least consonant with the frequent recognition, both by the Commission and by this Court, that there are occasions when it is appropriate for the former to consider *a carrier's need to meet other carriers' competition* as a factor justifying what otherwise would be an unreasonable or an unduly discriminatory rate." (Italics supplied.)

Competition has also been held to justify the charging of a lower rate for rail transportation of imported goods from a point on one seaboard to a point on another than is charged for identical goods of domestic origin, where the imported goods are susceptible of through transportation by water to the ultimate destination at a lower total cost than the sum of the water transportation plus local rail freight. *Texas & Pacific Ry.* v. *I.C.C.*, 162 U.S. 197, 233-4 (1896). We also refer to *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 165-7 (1897), where carrier competition was held to justify the charging of a lower rate for a longer than for a shorter haul of identical goods, and this Court distinguished *Wight* v. *U.S.*, *supra*, decided under §2 of the Interstate Commerce Act, and cited by Isbrandtsen.

Finally, and we believe most important, in *Swayne & Hoyt, Ltd.*, *supra*, this Court pointed out exactly how ocean carrier competition may justify a *prima facie* discrimination in ocean rates.

CONCLUSION

For the foregoing reasons, as well as for the reasons advanced in our principal brief, we respectfully submit that the judgment below should be reversed.

Respectfully submitted,

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